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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

PRIMA PAINT CORPORATION,
Petitioner,

v.

FLOOD & CONKLIN MFG. CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court (Pet. 1a-4a)[1] is not reported. The opinion of the Court of Appeals is reported at 360 F. 2d 315.

Jurisdiction

The order of the Court of Appeals was entered on May 12, 1966 (Pet. 14a). The petition for a writ of

1. "Pet." references are to the appendix to the brief of petitioner. "Exhibit" references are to exhibits to the motion papers in the court below.

certiorari was filed on July 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether, where a contract involving interstate commerce provides that "any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration * * *", a charge of fraud in the inducement of such contract is required to be settled by arbitration, as held by both courts below.

Statement of the Case

The underlying facts may be summarized as follows. On October 14, 1964, petitioner, a Maryland corporation, entered into a written agreement (the "Agreement") with respondent, a New Jersey corporation (Pet. 5c-13c). That Agreement, as petitioner's president accurately stated,

> "* * * contemplated and intended an orderly transfer of the assets of the defendant [respondent herein] to the plaintiff [petitioner herein], and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey together with the sales and servicing of customer accounts and the retention of the said customers" (Exhibit IV, matter in brackets added).

In return for the present transfer of its assets and for the consultative and advisory assistance it was to render, respondent was to be paid by petitioner a specified percentage of the net proceeds of all sales made by petitioner to respondent's former customers. Although the Agreement provided that the aggregate of all such

payments would in no event exceed $225,000, payable over a six year period, no minimum amount was guaranteed (Pet. 9c). The first payment was due on September 1, 1965, approximately eleven months after the execution of the Agreement and the transfer of the assets thereunder (Pet. 7c). On September 17, 1965, seventeen days after the first payment was due, and over a year after the Agreement was made, petitioner deposited the amount then due with an escrow agent and asserted certain "breaches" of the Agreement by respondent (Exhibit II-3). Respondent thereupon initiated arbitration proceedings, pursuant to paragraph 8 of the Agreement, which states:

> "8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association by three arbitrators, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shall be shared equally by Prima & F&C" (Pet. 12c).

Three days before the expiration of petitioner's time to appear, answer or otherwise move with regard to the demand for arbitration (its time to do so having been extended by respondent), petitioner commenced an action in the District Court seeking to rescind the Agreement on the ground that petitioner was fraudulently induced to enter into the Agreement (Pet. 1c).

Petitioner then moved to stay the arbitration, pending the adjudication of its action, and respondent in turn

moved to stay the action pending the arbitration. The District Court, disposing of both motions together, granted respondent's motion and ruled that the court action should be stayed, and that the arbitration should proceed (Pet. 1a-6a).

Petitioner thereupon appealed to the Court of Appeals, an appeal which respondent moved to dismiss as frivolous. The Court of Appeals granted respondent's motion and dismissed the appeal (Pet. 7a-14a).

Argument

The decision of the court below dismissing the appeal, and hence affirming the District Court's order directing arbitration, is clearly correct. It does not warrant review by this Court. Petitioner errs when it urges that the reasons which prompted this Court to grant certiorari in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2nd Cir. 1959), *cert. granted*, 362 U. S. 909 (1960), *dismissed pursuant to Rule 60*, 364 U. S. 801 (1960) are present in the instant case.

The primary issue in *Robert Lawrence* was whether federal law or state law should govern in ruling upon the arbitrability of a charge of fraud in the inducement of the contract, where the contract at issue involved interstate commerce and contained a provision for arbitration. In *Robert Lawrence* the Court of Appeals, in applying federal law and ordering arbitration, expressly noted (at 271 F. 2d p. 412) that New York law would have required a result contrary to the one which it reached, citing *Matter of Wrap-Vertiser Corp.* (*Plotnick*), 3 N. Y. 2d 17, 163 N.Y.S. 2d 639, 143 N.E. 2d 366 (1957). However, in the ensuing years, the course of New York's decisions regarding the very same underlying issue of

arbitrability has decisively changed. Thus where fraud in the inducement of a contract is now charged, the state courts reach the same conclusion as did the Court of Appeals in *Robert Lawrence,* namely that such question is properly cognizable by the arbitrators and is to be resolved in arbitration. This was recognized by the Court of Appeals in *In re Kinoshita & Co.,* 287 F. 2d 951, 953 (2nd Cir., 1961), wherein it was observed that:

> "Recent decisions by the New York courts have held similar arbitration clauses sufficiently broad to include fraud in the inducement. In Amerotron Corp. *v.* Maxwell Shapiro Woolen Co., N.Y. App. Div., 1st Dept. 1957, 3 A.D. 2d 899, 162 N.Y.S. 2d 214, affirmed without opinion, 1958, 4 N.Y. 2d 772, 171 N.Y.S. 2d 111, 148 N.E. 2d 319, the clause read any 'controversy or claim arising under or in relation to this order or contract,' and it was held the alleged fraud in the inducement was a question to be decided by the arbitrators. The same phraseology was held to include a claim for rescission based upon fraudulent inducement in Fabrex Corp. *v.* Winard Sales Co., Sup. Ct, N.Y. C'ty, 1960, 23 Misc. 2d 26, 200 N.Y.S. 2d 278. Arbitration of a claim of fraudulent inducement was also ordered in M. W. Kellogg Co. *v.* Monsanto Chemical Co., N.Y. App. Div., 1st Dept. 1959, 9 A.D. 2d 744, 192 N.Y.S. 2d 869, where the clause read 'arising under or in connection with' the agreement. Thus views more favorable to arbitration appear to be making headway."

Petitioner's assertion in its recitation of the questions presented (Brief, p. 2) that state law was "concededly" contrary to the federal law applied by both courts below is inaccurate. Respondent urged before both courts below that state law and federal law would require the same result. Indeed, the court below in citing (Pet. 11a)

Fabrex Corp. v. *Winard Sales Co.*, 23 Misc. 2d 26, 200 N.Y.S. 2d 278 (Sup. Ct., N.Y. Co. 1960), acknowledged that the law of New York is consistent with the result it reached. That case held as a proposition of New York law that:

> "Where an arbitration clause is broad and all inclusive, a request for rescission, either in a pending action or in a demand for arbitration, based upon fraud in the inducement will be left for determination of the arbitrators (citations omitted)." 200 N.Y.S. 2d 278 at 280.

In the recent case of *Application of Amphenol Corporation*, 49 Misc. 2d 46, 266 N.Y.S. 2d 768 (Sup. Ct., N.Y. Co. 1965), affirmed without opinion, 25 A.D. 2d 497, 267 N.Y.S. 2d 477 (N.Y. App. Div., 1st Dept. 1966), the court stated:

> "The issue of fraudulent inducement of a contract may unquestionably be arbitrated in New York. Its arbitrability is, however, dependent upon the scope of the arbitration agreement. The single most significant case against the proposition that fraud in the inducement is arbitrable is In re Wrap-Vertiser Corp. (Plotnick), 3 N.Y. 2d 17, 163 N.Y.S. 2d 639, 143 N.E. 2d 366. In that case the court held that the arbitration clause was so narrow in scope that the question of fraudulent inducement did not come within its purview.
>
> "It is the court's opinion that the arbitration clause herein is sufficiently broad so as to indicate that it was the intention of the parties to include questions of fraud and rescission as those arbitrable. (See in re Fabrex Corp. (Winard Sales Corp.), 23 Misc. 2d 26, 200 N.Y.S. 2d 278)." 266 N.Y.S. 2d 768, 769-770.

The arbitration clause in the instant case, as noted by the court below, incorporated the standard clause recom-

mended by the American Arbitration Association (Pet. 11a) and would, under the law of New York as expressed by its courts since 1960, most assuredly cover a dispute over fraudulent inducement.

Accordingly, unlike the situation which prevailed at the time *Robert Lawrence* was decided, petitioner herein has not been prejudiced by its choice of forum. In the present state of the law, the petitioner would have been ordered to arbitrate its alleged grievances even if it had chosen to commence its litigation in the state court rather than in the federal court. Thus, the issues which were raised by *Robert Lawrence* are, insofar as the instant case is concerned, entirely moot. There is, accordingly, no real controversy present which merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
August 12, 1966.

Respectfully submitted,

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